UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF WASHINGTON

FIDELITAD, INC., Plaintiff, v. INSITU, INC., Defendant.	NO: 13-CV-3128-TOR ORDER DENYING DEFENDANT'S MOTION TO DISMISS COUNT V OF THE SECOND AMENDED COMPLAINT

BEFORE THE COURT is Defendant's Motion to Dismiss Count V of Plaintiff's Second Amended Complaint (ECF No. 39). This matter was heard with oral argument on October 14, 2014. Mark G. Jackson and Kevin A. Rosenfield appeared on behalf of the Plaintiff. Eric B. Wolff appeared on behalf of Defendant. The Court has reviewed the briefing and the record and files herein, and is fully informed.

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BACKGROUND[1]

Plaintiff was formed in early 2010 by Eric Edsall and Alejandro Pita. Prior to forming the company, Mr. Edsall and Mr. Pita were employed by Defendant as, respectively, the head of international business development and head of program management. In these roles, Mr. Edsall and Mr. Pita were responsible for driving sales of unmanned aerial systems ("UAS") manufactured by Defendant known as the ScanEagle.

In late 2009, while still employed by Defendant, Mr. Edsall and Mr. Pita traveled to Colombia to meet with representatives of the Columbian Air Force. While in the country, Mr. Edsall and Mr. Pita identified a number of new, non-military applications for the ScanEagle. These applications included, among others, monitoring oil pipelines located in remote areas.

Upon returning to the United States, Mr. Edsall and Mr. Pita met with several of Defendant's executives to discuss the new opportunities they had identified in Colombia. Insitu was generally supportive, but was hesitant to divert resources away from its core military-focused applications. Thus, Mr. Edsall and

[1] Unless otherwise noted, these are taken from Plaintiff's Second Amended Complaint (ECF No. 37) and are considered true for the purpose of the instant motion only.

Mr. Pita proposed to form a new business, at their own risk and expense, to act as a value-added reseller of Defendant's products in Colombia. Shortly thereafter, Defendant granted Plaintiff the exclusive right to sell Defendant's products in Colombia. The parties also entered into a written Mutual Proprietary Information Agreement specifying the purposes for which proprietary information exchanged between them could be used.

In the months that followed, Plaintiff developed several potential sales opportunities with customers in Columbia. Plaintiff kept Defendant apprised of its progress and gave several presentations outlining its business strategy. Eventually, Plaintiff closed several sales with customers in Colombia and placed orders for UAS products with Defendant.

Plaintiff alleges that Defendant then "intentionally and maliciously moved forward with a charade of 'legal review' and 'license requirements' to delay the shipment of products to Fidelitad." Pl.'s Compl., ECF No. 37 at ¶ 61. Specifically, Plaintiff contends that Defendant delayed processing of the sales under the guise of needing to perform a Risk/Benefit Analysis Memorandum and other legal compliance reviews. Pl.'s Compl., ECF No. 37 at ¶¶ 64-65, 72. Plaintiff further alleges that Defendant delayed shipping a ScanEagle and related equipment under the pretext of seeking clarification from the U.S. Department of State about the scope of an export license granted to Plaintiff. Pl.'s Compl., ECF

No. 37 at ¶¶ 78-81. In Plaintiff's estimation, the purpose of these delay tactics was to create tension between Plaintiff and its Colombian customers, thereby paving the way for Defendant to sell its products to the customers directly.

Plaintiff alleges that Defendant's deliberate delay in processing its orders caused its customers to cancel their sales contracts. According to Plaintiff, this resulted in a loss of several million dollars in sales revenue. Fidelitad further alleges that Defendant has since completed several million dollars' worth of sales to the same Colombian customers whom Plaintiff had previously cultivated.

Plaintiff filed the instant lawsuit in Klickitat County Superior Court on October 16, 2013. Defendant removed the case to this Court on November 20, 2013, pursuant to 28 U.S.C. § 1442(a)(1), the so-called federal officer removal statute. ECF No. 37. Plaintiff thereafter filed a motion to remand, arguing that the requirements for federal officer removal have not been satisfied. ECF No. 6. That motion was denied. ECF No. 17.

Plaintiff's Second Amended Complaint asserts state law causes of action for (I) violation of the Washington Uniform Trade Secret Act (WUTSA), (II) breach of the Proprietary Information Agreement, (III) breach of the implied duty of good faith and fair dealing, (IV) unjust enrichment, and (V) tortious interference with business expectancy. ECF No. 37. Defendant now brings a motion to dismiss

Plaintiff's claim for tortious interference arguing the claim is preempted by the WUTSA claim and also that it is fatally implausible. ECF No. 39-1.

LEGAL STANDARD

A complaint must contain a "short and plain statement of the claim showing that the pleader is entitled to relief." Fed. R. Civ. P. 8(a)(2). This standard "does not require detailed factual allegations, but it demands more than an unadorned, the defendant-unlawfully-harmed-me accusation." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007)). In assessing whether Rule 8(a)(2) has been satisfied, a court must first identify the elements of the plaintiff's claim(s) and then determine whether those elements could be proven on the facts pled. The Court should generally draw all reasonable inferences in the plaintiff's favor, *see Sheppard v. David Evans and Assocs.*, 694 F.3d 1045, 1051 (9th Cir. 2012), but it need not accept "naked assertions devoid of further factual enhancement." *Iqbal*, 556 U.S. at 678 (internal quotations and citation omitted). "Dismissal can be based on the lack of a cognizable legal theory or the absence of sufficient facts alleged under a cognizable legal theory." *Balistreri v. Pacifica Police Dep't*, 901 F.2d 696, 699 (9th Cir. 1988).

DISCUSSION

Defendant argues first that Plaintiff's claim for tortious interference with business expectancies should be dismissed because it is based on the same facts as

Plaintiff's WUTSA claim and is thereby preempted under the WUTSA statute. Plaintiff contends on the other hand that the claims are based upon different underlying facts and that Defendant's motion should be dismissed.

The WUTSA allows a plaintiff to recover monetary damages for the misappropriation of trade secrets. RCW 19.108.030. Misappropriation is the

> (a) Acquisition of a trade secret of another by a person who knows or has reason to know that the trade secret was acquired by improper means; or
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> (b) Disclosure or use of a trade secret of another without express or implied consent by a person who:
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> > (i) Used improper means to acquire knowledge of the trade secret; or
> >
> > (ii) At the time of disclosure or use, knew or had reason to know that his or her knowledge of the trade secret was (A) derived from or through a person who had utilized improper means to acquire it, (B) acquired under circumstances giving rise to a duty to maintain its secrecy or limit its use, or (C) derived from or through a person who owed a duty to the person seeking relief to maintain its secrecy or limit its use; or
> >
> > (iii) Before a material change of his or her position, knew or had reason to know that it was a trade secret and that knowledge of it had been acquired by accident or mistake.

RCW § 19.108.010(2). "'Improper means' includes theft, bribery, misrepresentation, breach or inducement of a breach of a duty to maintain secrecy, or espionage through electronic or other means." RCW § 19.108.010(1). It is the Plaintiff's burden to establish the existence of a trade secret, that it was misappropriated, and that the

acquisition was done by improper means or through a person who owed a duty to maintain the secrecy of the trade secret. *Petters v. Williamson & Associates, Inc.*, 151 Wash.App. 154, 164 (2009).

The WUTSA "displaces conflicting tort, restitutionary, and other law of this state pertaining to civil liability for misappropriation of a trade secret." RCW 19.108.900(1). The WUTSA does not, however, affect "contractual or other civil liability or relief that is not based upon misappropriation of a trade secret." RCW 19.108.900(2)(a); *see also Ed Nowogroski Ins., Inc. v. Rucker*, 88 Wash.App. 350, 357–58 (1997). In evaluating whether a cause of action is preempted under the WUTSA, courts

> (1) assess the facts that support the plaintiff's civil claim, (2) ask whether those facts are the same as those that support the plaintiff's UTSA claim, and (3) hold that the UTSA preempts liability on the civil claim unless the common law claim is factually independent from the UTSA claim.

Thola v. Henschell, 140 Wash.App. 70, 82 (2007); *accord Int'l Paper Co. v. Stuit*, No. 11-CV-2139, 2012 WL 3527932, at *2 (W.D. Wash. Aug 15, 2012).

To carry its tortious interference claim, Plaintiff must show "(1) the existence of a valid contractual relationship or business expectancy; (2) that defendants had knowledge of that relationship; (3) an intentional interference inducing or causing a breach or termination of the relationship or expectancy; (4) that defendants interfered for an improper purpose or used improper means; and

(5) resultant damages." *Int'l Paper*, 2012 WL 3527932, at *2 (citing *Commodore v. Univ. Mech. Contractors, Inc.*, 120 Wash.2d 120, 137 (1992)). The difference between Plaintiff's WUTSA claim and its tortious interference claim is the misappropriation of a trade secret. Plaintiff "may not rely on acts that constitute trade secret misappropriation" to support its tortious interference claim. *Thola*, 140 Wash.App. at 82. On the other hand, where evidence establishing a tortious interference claim "does not involve the acquisition or disclosure of confidential information" in a manner that would establish a WUTSA claim, a tortious interference claim is not preempted. *Id.* at 83.

Plaintiff contends that its "business plan, master plan, customer development, and other information" constitute trade secrets. ECF No. 37 at ¶108. Plaintiff further contends that Defendant misappropriated these trade secrets without Plaintiff's consent. *Id.* ¶112. These allegations, should they be proven true, may preempt a tortious interference claim where Defendant's knowledge of Plaintiff's business relationships, as Plaintiff alleges, was founded upon the misappropriation of trade secrets. However, the Court is not convinced at this point that the voluntary disclosure of trade secrets constitutes misappropriation, in which case Plaintiff's tortious interference claim would likely not be preempted.

The Court views Plaintiff's Count I and Count V as alternatives. Plaintiff may succeed on the merits of Count I if it can prove that Defendant

misappropriated trade secrets. Should Plaintiff fail to establish sufficient evidence for Count I, Plaintiff may still succeed on Count V if it can prove that Defendant nevertheless tortuously interfered with Plaintiff's business expectancies. At the pleading stage it does not matter that these claims are potentially inconsistent. Fed. R. Civ. P. 8(d)(e).

It is premature to dismiss Plaintiff's tortious interference claim. A conclusion of whether a claim is preempted by the WUTSA is generally reserved for later in litigation because it requires a factual analysis and facts are poorly developed at the pleading stage. *See, e.g., First Advantage Background Srvcs. Corp. v. Private Eyes, Inc.*, 569 F.Supp.2d 929, 942 (N.D. Cal. 2008) (denying motion to dismiss a fraud claim as preempted by CUTSA to the extent the claim was based on facts that may or may not constitute trade secrets, but affording defendant ability to raise the issue again in subsequent pleadings and briefing); *Int'l Paper*, 2012 WL 3527932, at *3 (denying motion to dismiss, but allowing defendant to raise the issue again in later proceedings); *Thola*, 140 Wash.App. at 81–83 (motion for directed verdict); *Ed Nowogroski Ins., Inc.*, 88 Wash.App. at 355 (motion for partial summary judgment). If it is established in later pleadings or briefing that Defendant misappropriated trade secrets, the Court will consider further the preemption of Plaintiff's tortious interference claim to the extent that it is based upon the misappropriation of trade secrets. However, at this this juncture,

the Court cannot conclude whether or not Plaintiff has established that Defendant misappropriated trade secrets as defined by the WUTSA. As such, the Court cannot conclude at this phase of the proceedings whether Plaintiff's tortious interference claim rests on "acts that constitute trade secret misappropriation." *Thola*, 140 Wash.App. at 83.

Defendant argues in the alternative that Plaintiff's tortious interference claim should be dismissed because it is "fatally implausible and conclusory." Specifically, Defendant contends it had a legal right to terminate its at-will supplier/buyer relationship with Plaintiff, and that doing so cannot, as a matter of law, be "improper" as is required to establish a tortious interference claim.

"Exercising one's legal interest in good faith is not improper interference." *Elcon Constr., Inc. v. E. Wash. Univ.*, 174 Wash.2d 157, 168 (2012) (en banc); *Birkenwald Distrib. Co. v. Hueblein, Inc.*, 55 Wash.App. 1, 12 (1989) ("Asserting one's rights to maximize economic interests does not create an inference of ill will or improper purpose."). However, the mere existence of at-will business relationships is not dispositive in tortious interference claims. *See Island Air, Inc. v. LaBar*, 18 Wash.App. 129, 140 (1977) ("Further, the fact that a party's terminable at will contract is ended in accordance with its terms does not defeat that party's claim for damages caused by unjustifiable interference, for the wrong for which the courts may give redress includes also the procurement of the

termination of a contract which otherwise would have continued in effect." (internal quotation marks and alterations omitted)). Instead, the proper inquiry, "when one acts to promote lawful economic interests," is to ask whether the action was taken with a "bad motive" or in "bad faith." *Birkenwald*, 55 Wash.App. at 11 ("incidental interference will not suffice" to establish impropriety); *accord Elcon Constr.*, 174 Wash.2d at 168 ("Exercising one's legal interest *in good faith* is not improper interference." (emphasis added)).

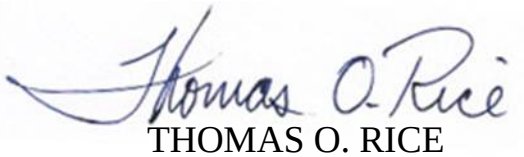
Whether Defendant terminated its supplier relationship with Plaintiff in bad faith is an issue of material fact. At this stage, the Court must accept Plaintiff's factual allegations as true and construe them in the light most favorable to Plaintiff. *Sheppard*, 694 F.3d at 1048. Plaintiff alleges that Defendant terminated its at-will supplier relationship in bad faith. Specifically, Plaintiff alleges that Defendant had encouraged Plaintiff to develop the Columbian markets and had promised Plaintiff exclusive distribution rights within that market. Defendant then, Plaintiff alleges, purposefully ended its supplier relationship in order to cut Plaintiff out of the market Plaintiff had developed and to allow Defendant to take advantage of that market to Plaintiff's detriment. *E.g.*, ECF No. 37 at ¶31, 167, 168. Taken as true, these allegations are sufficient to establish a cognizable legal theory that Defendant acted in bad faith when it ended its supplier relationship with Plaintiff. Defendant's motion is denied.

IT IS HEREBY ORDERED:

Defendant's Motion to Dismiss Count V (ECF No. 39) is **DENIED**.

The District Court Executive is hereby directed to enter this Order and provide copies to counsel.

DATED October 24, 2014.



THOMAS O. RICE
United States District Judge